78-1564

No. 79

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1979

ROBERT A. BEAUMONT,
Petitioner,

-vs-

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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An order, affirming the decision of the Michigan Civil Service Commission on the appeal of the petitioner to the Ingham County Circuit Court denying him relief, was entered on September 29, 1976. (Appendix A)

The opinion of the Michigan Court of Appeals was entered on June 7, 1978, affirming the decision of the Ingham County Circuit Court. (Appendix B)

An application for leave to appeal from the decision of the Michigan Court of Appeals was filed with the Michigan Supreme Court. The application for leave to appeal was denied on January 17, 1979. (Appendix C).

JURISDICTION

The decision of the Supreme Court of Michigan denying the application for leave to appeal was entered on January 17, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Was the petitioner, a Lt. Colonel in the United States Army Reserve, deprived of due process of law and the equal protection of the law, as guaranteed to him by Articles V and XIV of the Amendments to the United States Constitution, when he was fired from State employment by the Michigan Department of Labor upon his return from active duty on November 20, 1972, without a hearing before the Governor of the State of Michigan, as legislatively mandated by Act 205, 1897, the Veterans Preference in Employment Act, Act 263, 1951; and in violation of Rights of Public Employees Who Enter Armed Forces, M.S.A. 4.1221, et seq; and, Act 263, 1951, Rights of Public Employees Who Enter Armed Forces, M.S.A. 4.1486 (1) (3) et seq; and, Act 133, 1955, Military Leaves and Re-employment Protection, M.S.A. 1487 (1)?

2. Was the petitioner deprived of/the protection of Article V and XIV of the United States Constitution by the State Courts of Michigan which absolutely refused to adjudicate whether or not the petitioner was entitled to the protection of the Acts listed above in question number #1, especially in view of the fact that the petitioner was required to report for duty by a Federal order and was exonerated of any wrongdoing by the United States Army?

STATEMENT OF THE CASE

The petitioner was classified as a Labor Safety Supervisor 13 in the Safety and Regulation Division of the Michigan Department of Labor on November 20, 1972. He was discharged from that position upon returning from active duty as a Lt. Colonel in the United States Army Reserve. (Appendix B, pages 1, 2 and 3) At the time of his removal, it was the written policy of the State of Michigan in accordance with a document entitled, Statement of Support for the Guard and Reserves, to support petitioner while on duty with the United States Army and to cooperate with him in his State employment. (Appendix D, P).

The petitioner appealed his dismissal from State employment by requesting a hearing before a hearing examiner of the Michigan Civil Service Commission on January 31, 1973. Petitioner, in compliance with state law, contacted the legal advisor to the Governor and requested a hearing. He wrote a letter to the Governor requesting a hearing before the Governor of the State of Michigan, pursuant to the provisions of the Veterans Preference in Employment Act, M.S.A. 4.1221 et seq. (Appendix E, P) The request was denied by Barry Brown, the Director of the Department of Labor, stating that the State statutes alluded to by the petitioner did not apply to him, apparently, because he was a State Civil Service employee. (Appendix F, P) The Veterans Preference in Employment Act, Act 205, 1897, was in existence prior to the adoption of Article VI, Section 22 of the Michigan

Constitution of 1908. Civil Service was adopted on January 1, 1941, amending the Michigan Constitution, creating Civil Service.

At no time, although requested before the hearing examiner, the Michigan Civil Service Commission, a hearing referee appointed by the Department of Labor, the Ingham County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court, has a judicial body ruled why petitioner was not entitled to the protection of the Acts aforesaid. The courts have absolutely refused to discuss the matter although the petitioner has continuously raised the issue throughout the proceedings. (R 79 and Exhibit A, R 81 and R 88)

The three state statutes are as follows:

1. "*Rights of Public Employees Who Enter Armed Forces*", M.S.A. 4.1486(1), being Act 263 of 1951.

The pertinent language of the statutory enactment aforesaid is M.S.A. 4.1486 (4) which states:

> "Any public employee who holds a position in a public employment *shall be granted* a leave of absence for the purpose of being inducted or otherwise entering military duty. If not accepted for such duty, the employee shall be reinstated in his position without loss of seniority or status or reduction in his rate of pay".

The petitioner was a public employee. He entered the Armed Services for military duty, in accordance with orders that were submitted to him by the United States Government.

Further, M.S.A. 4.1486 (6) states:

> "Any laws or parts of laws, which are inconsistent with the provisions of this Act, or which would serve to defeat the purposes thereof, shall to such extent be deemed inapplicable to public employers and public employees in the exercise of the rights and privileges conferred by this Act".

This legislative enactment was intended to apply to public employees who enter the Armed Forces as set forth in the entitlement of the statute. The statute has never been repealed directly or by implication. No constitutional provision supersedes it. The statute aforesaid is legally vital in the State of Michigan protecting those persons who are public employees who enter the Armed Forces. The hearing officer stated:

> "The Hearing Officer finds no violation of the rights granted the employee under the Constitution of the laws of the State of Michigan or of the United States. It was not established by the evidence that the employee was discriminated against because of his service nor was he hindered or prevented from performing military service".

However, that is not the point. The point is, that the statutory language, M.S.A. 4.1486 (4), states that he *shall be granted* leave of absence for the purpose of being inducted or otherwise entering military duty. The statute was violated by the State Department of Labor because on November 20, 1972, without any prior warning, the petitioner was fired when he returned from military duty. A specific complaint lodged against the petitioner was that he was on military leave from October 24, 1972 through November 17, 1972, and, that he failed to notify his supervisor that he would be on military leave for that period of time. (Service Rating Report, DOL, Exhibit I) M.S.A. 4.1486 (3), states as follows:

> "Any person who is restored to a position, in accordance with the provisions of this act shall not be discharged from such position *without cause within one year after such restoration*. . ."

The petitioner did nothing wrong within the one year period *after* he returned from military duty because he was fired on the day of his return, that is, November 20, 1972.

The next state statute which applies is M.S.A. 4.1487 (1), entitled:

"Military Leaves and Re-employment Protection", (Act 133 of 1955, page 197 immediately effective June 7, 1955).

The dismissal of the petitioner occurred after 1955, that is, November 20, 1972. The petitioner was on military leave because that is the charge lodged against him as stated aforesaid. The statute reads as follows:

§4.1487 (1): *"Officers and enlisted men of military or Naval Forces; not to be discriminated against*

Section 1. No person shall discriminate against any officer or enlisted man of the military or naval forces of the state or of the United States because of his membership therein". (CL'48, §32.271)

§4.1487 (2): "Same; military forces of state, discharge of employee or dissuading him from enlistment or accepting commission.

Section 2. No employer or officer or agent of any corporation company or firm, or other person shall discharge any person from employment because of being or performing his duty as an officer or enlisted man of the military or naval forces of this state, or hinder or prevent him from performing any military service or from attending any military encampment or place of drill or instruction, he may be called upon to perform or attend by proper authority or dissuade any person from enlistment or accepting a commission in the national guard or naval militia by threat of injury to him in respect to his employment, trade or business in case his enlistment of state, discharge of employee or dissuading him from enlistment or accepting commission.

Section 2: No employer or officer or agent of any corporation, company or firm, or other person shall discharge any person from employment because of being or performing his duty as an officer or enlisted man of the military or naval forces of this state, or hinder or prevent him from performing any military service or from attending any military encampment or place of drill or instruction, he may be called upon to perform or attend by proper authority or dissuade any person from enlistment or accepting a commission in the national guard or naval militia by threat of injury to him in respect to his employment, trade or business in case his enlistment of a commission. (CL'48, §32.273)

This statutory enactment has not been repealed in the State of Michigan, either expressly or by implication. The statutes apply to employees in State Civil Service, if not, the statutory language would have excluded them. The Michigan Constitution did not exclude Civil Service employees from the protection of the statutory language, if so, there would have been a specific statement that Civil Service military personnel or veterans have no rights under the law of the State of Michigan. The Legislature did not see fit to make that assertion nor should a court.

The next statute of Michigan that applies in this case is the *"Preference in Employment Act"*, Act 205 of 1897, page 264, effective August 30, 1897, as amended by the Public Acts of 1944, being M.S.A. 4.1221, et seq.

M.S.A. 4.1222, states specifically, as follows:

"No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries as indicated in the preceding section holding an office or employment in any public department or public works of the state or any county, city or township, or village of the state, except

heads of departments, members of commissions, and boards and heads of institutions, appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official conduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, *except after a full hearing before the* governor of the state if a state employee. . . . .".

The petitioner was a state employee. He was dismissed from his job, without a hearing before the Governor, even though he requested it, and, that request was ignored.

During the proceedings, an attempt was made to discipline Lt. Colonel Baumont with the military. He was exonerated of any wrongdoing on August 9, 1973. (Appendix B, P) Page 3 of decision of Michigan Court of Appeals.

It is to this cavalier disregard of the statutes of Michigan and the refusal of the State Courts of Michigan to answer the petitioner's questions that this petition is directed.

REASONS FOR GRANTING THE WRIT

1. THE QUESTION OF WHETHER OR NOT A STATE CIVIL SERVICE EMPLOYEE OF MICHIGAN, WHO IS ALSO A MEMBER OF THE UNITED STATES ARMY RESERVE AND A VETERAN, IS ENTITLED TO THE PROTECTION OF THE VETERANS PREFERENCE IN EMPLOYMENT ACT IN MICHIGAN, AS WELL AS THE OTHER ACTS HERETOFORE MENTIONED, IS OF PARAMOUNT IMPORTANCE TO CIVIL SERVICE EMPLOYEES OF MICHIGAN. IT IS OF EQUAL IMPORTANCE TO THEM TO KNOW WHETHER OR NOT THE COURTS OF MICHIGAN ARE ACTUALLY REQUIRED TO ENFORCE ITS OWN LAWS.

The Preference in Employment Act for Veterans, Act 205 of 1897, effective August 30, 1897, as amended, states:

"No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries as indicated in the preceding section holding an office or employment in any public department or public works of the state or any county, city or township or village of the state, except heads of departments, members of commissions, and boards and heads of institutions, appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, *except after a full hearing before the governor of the state if a state employee*. . . .".

The petitioner has consistently claimed that he was entitled to a hearing before the Governor of the State of Michigan, in accordance with the provisions of the Veterans Preference in Employment Act, M.S.A. 4.1221, et seq. He has been denied one. No court charged with the responsibility of interpreting the laws of the State of Michigan, has ruled or advised him why he was not entitled to the protection of the state statutes referred to above. If the petitioner cannot request the judiciary to answer his question, where can he turn? If the Governor of Michigan refuses to conduct a hearing and the courts of Michigan absolutely refuse to discuss the issue, the petitioner contends that he has been deprived of due process of law.

State law granted petitioner a right, that is, a hearing before the Governor in conformity with the Veterans Preference Act aforesaid. That hearing was denied. Petitioner had a right to a full, fair hearing before the Governor before he could be removed from his position in state government.

Furthermore, in M.S.A. 4.1486(4), it is stated:

> "Any public employee who holds a position in a public employment *shall be granted* a leave of absence for the purpose of being inducted or otherwise entering military duty. If not accepted for such duty, the employee shall be reinstated to his position without loss of seniority or status or reduction in his rate of pay".

In this case, the petitioner was called to active duty with the United States Army Reserve. He was required to follow the Federal order! If he had refused, he could have been disciplined by the Army. However, in following federal orders, which are supreme to that of any state law, he was fired upon his return on November 20, 1972. The state contends that he was removed for other reasons, which the petitioner contends are untrue. The complaint lodged against the petitioner was that he was on military leave from October 24, 1972 through November 17, 1972 and that he failed to notify his supervisor that he would be on military leave for that period of time. (DOL Exhibit #1)

However, it was stated by his employer at his hearing, "It is clear by the procedures that for military leave purposes, employees do not need the approval of their supervisor". (R 79 and 81)

Furthermore, M.S.A. 1486 (3) states:

> "Any person who is restored to a position, in accordance with the provisions of this act shall not be discharged from such position *without cause within one year after such restoration*. . . .".

The petitioner did nothing wrong within the one year period after he returned from military leave because he was fired on the very day that he returned, that is, November 20, 1972.

2. THE PETITIONER WAS DEPRIVED OF THE PROTECTION OF ARTICLE V AND XIV OF THE UNITED STATES CONSTITUTION BY THE STATE COURTS OF MICHIGAN WHICH ABSOLUTELY REFUSED TO ADJUDICATE WHETHER OR NOT THE PETITIONER WAS ENTITLED TO THE PROTECTION OF THE ACTS LISTED IN QUESTION NUMBER ONE (1), ESPECIALLY IN VIEW OF THE FACT THAT THE PETITIONER WAS REQUIRED TO REPORT FOR DUTY BY A FEDERAL ORDER AND WAS EXONERATED OF ANY WRONGDOING BY THE UNITED STATES ARMY.

On July 28, 1868, the Fourteenth Amendment was adopted to make more meaningful the rights and privileges of all American citizens. As an American citizen, therefore, one has two principal sources of protection against any violation of basic individual rights. One is the Constitution and laws of a state. The other is the Constitution and laws of the United States. In the years since the adoption of the Constitution and the Amendments, which were designed to control the activities of the national government, those ten amendments, plus the Fourteenth Amendment, have been used to control

the actions of State Governments. The federal government has become the government of last resort for persons asserting their civil rights and liberties.

The appellate courts of Michigan have absolutely refused to adjudicate whether or not petitioner is entitled to the protection of the Acts aforesaid, that is, "state action" within the meaning of the Fourteenth Amendment. In *Ex Parte Virginia*, 100 US 339, p 346, the court stated:

> "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

The petitioner, because he was not accorded a full hearing before the Governor of Michigan, contends that he was denied due process of law and the equal protection of the law under the Fourteenth Amendment to the United States Constitution.

In *Brouwer* v *Kent County Clerk*, 377 Mich 616, p 644, the court referred to *Ex Parte Virginia*, supra, as follows:

> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v *Rives*, 100 US 313 (25L ed 667); *Pennsylvania* v *Board of Directors of City Trusts of Philadelphia*, 353 US 230 (77S Ct 806, 1 L ed 2d 792); *Shelley* v *Kraemer*, 334 US 1 (68 S Ct 836, 92 L ed 1161, 2 ALR2d 441), or whatever the guise in which it is taken, see *Derrington* v *Plummer* (CA5), 240 F2d 922; *Department of Conservation & Development, Commonwealth of Virginia* v *Tate*, (CA4), 231 F2d 615. *Cooper* v *Aaron* (1958), 358 US 1, 16, 17 (78 S Ct 1401, 3 L ed 2d 5, 19)."

The court stated further:

> "For example, in *Southern R. Co.* v *Greene* (1910), 216 US 400 (30 S Ct 287, 54 L ed 536), the United States Supreme Court stated the requirements of the equality clause this way, at p 412:
>
> " 'The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to hear the same burdens as are imposed upon, other persons in a like situation.' " (p 641)

Also, on page 646 of the opinion, the court stated:

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said

generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances."

In view of this language, how can the State of Michigan deprive State Civil Service employees, who are coincidentally in the United States military, of the protection of the Acts aforesaid in the same manner as other citizens who are not Civil Service employees?

What does the Fourteenth Amendment mean when it requires "due process of law", and, "equal protection of the law"? Are these two concepts mutually exclusive? Are they separate and distinct philosophical legal concepts?

The answer is, the clauses should be construed together. In *Vernon* v *The State*, 245 Ala. 633, p 635, it is stated:

"[1,2] Procedural due process, broadly speaking, contemplates the rudimentary requirements of fair play, which include a fair and open hearing before a legally constituted court or other authority, with notice and opportunity to present evidence and argument, representation by counsel, if desired, and information as to the claims of the opposing party, with reasonable opportunity to controvert them. *Garret* v *Reid*, 244 Ala. 254, 13 So.2d 97; *Shields* v *Utah Idaho Cent. R. Co.*, 305 US 177, 59 S.Ct. 160, 93 L.Ed. 111; *Morgan* v *United States*, 304 US 1, 58 S.Ct. 773, 83 L.Ed 1129, 42 Am. Jur. 379; *Frahn* v *Gregling Realization Corp.*, 239 Ala. 580, 195 So. 758; *Almon* v *Morgan County*, Ala. Sup., 16 So. 2d 511.

"And in *Barrington* v *Barrington*, 206 Ala. 192, 89 So. 512, 513, 17 A.L.R. 789, it was said: 'Due process of law guaranteed by the federal Constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. *Caldwell* v *Texas*, 137 US 692, 11 S. Ct. 224, 34 L.Ed. 816; *Leeper* v *Texas*, 139 US 462, 11 S. Ct. 577, 35 L.Ed 225.' "

In the instant case, the petitioner maintains that due process of law required a full hearing before the Governor of the State of Michigan, prior to the time that he was removed from State employment on November 20, 1972, in accordance with the Veterans Preference in Employment Act, supra. Certainly, the equal protection clause construed with the due process clause contemplates that one has access to the courts for relief, free from the "orders of the government", that deprive petitioner of the protection of the law. The "order of government" was the refusal of the appellate courts to answer petitioner's question, was he entitled to the protection of the Acts aforesaid, and the Veterans Preference in Employment Act, supra?

State, County, City, Township or Village employees are entitled to the protection of the Veterans Preference in Employment Act, supra. The method for their removal is clearly set forth in the statutory provisions. Is it not true that a State employee is entitled to the same protection, especially in view of the fact that the Act specifically refers to State employees?

The petitioner cannot comprehend why he was not entitled to the same protection of the Act, as well as the other Acts, as any other citizen before being removed from his job with the State of Michigan. What rational classification can be made that excludes State employees from the protections of the Act aforesaid? Certainly, if it is stated that public employees are not entitled to the protection of the Act aforesaid, it is an unreasonable and arbitrary classification.

In the document entitled, "Statement of Support for the Guard and Reserve," (Appendix D, P), it was the avowed policy of the State of Michigan to protect the job and career opportunities of State employees, who, coincidentally

serve in the National Guard of Reserve forces of the United States! Why then, has every governmental unit of Michigan, ignored the legislative mandate, and this policy statement including the Governor, who adopted it, that is, "Our employees job and career opportunities will not be limited or reduced by their service in the Guard or Reserve"? But that's exactly what happened to the petitioner when he returned from military duty on November 20, 1972!

In the Fourteenth Amendment by Brannon, it is stated, on page 320, as follows:

> "Justice Field, in the opinion of *Barber* v *Connolly* (113 US 27), said the Fourteeenth Amendment in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws', undoubtedly meant, not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all alike under like circumstances in the enjoyment of their personal and civil rights, that all persons should be entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one man than are laid upon others in the same calling and condition; . . . ."

In the instant case, the petitioner was denied "access to the courts" because the appellate courts of Michigan refused to address themselves to the problem that he raised under the statutes alluded to aforesaid. How, then, was his right to enjoy his property "equally protected"? The word "protected" or "protection", certainly must encompass the right to be heard in court or to at least have the court answer his question. However, when the petitioner attempted to exercise his rights in Michigan, granted to him by the Legislature by the adoption of the three state statutes aforesaid, he was deprived of their protection by the power of the State of Michigan, that is, its judicial branch of government which absolutely refused and failed to discuss the issues that he raised. This is his grievance, and a just one at that!

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted, so that the decision of the Supreme Court of Michigan be reversed and petitioner granted a hearing before its Governor.

Respectfully submitted,

WLM

DATED: March , 1979.

EXHIBIT "A"

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

ROBERT A. BEAUMONT,
Plaintiff,

-vs- No. 73-16070-AV

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,
Defendants.

ORDER AFFIRMING DECISION OF CIVIL SERVICE COMMISSION

At a session of said Court held in the City of Lansing, County of Ingham, on September 29, 1976

PRESENT: Honorable James T. Kallman, Circuit Judge

WHEREAS the appeal of Robert A. Beaumont from a decision of the Civil Service Commission affirming his dismissal from employment by his appointing authority the Michigan Department of Labor has been argued and briefed by counsel for the respective parties, and the Court being fully advised in the premises, and in accordance with the opinion of the Court issued on September 8, 1976;

IT IS HEREBY ORDERED AND ADJUDGED that the decision of the Civil Service Commission be and the same hereby is affirmed.

(s) JAMES T. KALLMAN
Circuit Judge

(s) WILLIAM L. MACKAY
Attorney for Robert A. Beaumont

APPROVED AS TO FORM ONLY WPM WM

(s) FELIX E. LEAGUE (P16481)
Assistant Attorney General
Attorney for Department of Labor
and Civil Service Commission

EXHIBIT "B"

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT A. BEAUMONT,
Plaintiff-Appellant,

-vs- Docket #30559

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,
Defendants-Appellees.

BEFORE: V. J. Brennan, P.J., and D. E. Holbrook and Martin, JJ. PER CURIAM

Plaintiff Robert A. Beaumont appeals the decision of Judge James T. Kallman in Ingham County Circuit Court on September 8, 1976, affirming the Civil Service Commission in upholding the decision of November 20, 1972 to dismiss plaintiff from his position as Labor Safety Supervisor in the Bureau of Safety and Regulation of the Michigan Department of Labor. Plaintiff appeals as of right, pursuant to GCR 1963, 806.1.

The facts of this case, being complicated, require brief restatement. On September 6, 1972, plaintiff was advised by memorandum that an evaluation report submitted June 15, 1972 indicated the performance of his work unit, known as Safety Services West, was significantly inferior to that of Safety Services East. He was advised to take appropriate remedial action. This memorandum also charged that plaintiff had refused to utilize rating criteria developed by his immediate supervisor in evaluating the performance of new employees and had rather applied his own standards.

When budget cuts in 1972 forced a limitation to the number of employees attending the annual meetings of the National Safety Congress in Chicago, plaintiff was informed he had not been selected to attend. His appeals for reconsideration were rejected, and he was told that if he wished to attend the meetings he would have to do so at his own expense. He was informed at this time that arrangements for annual leave should be made with his immediate supervisor. This information was communicated to plaintiff by memorandum on or about October 19, 1972.

During the week prior to October 21, 1972, plaintiff advised his secretary that he was leaving on October 21, 1972 and would be gone for one month. He stated he would return on November 20, 1972 and would leave again for Thanksgiving, taking off the Friday following Thanksgiving as annual leave time. This absence was to be followed by a week of military leave. He also advised his secretary not to tell anyone of his intended absences.

Plaintiff's immediate supervisor, Albert L. Osborn, first learned that plaintiff would be absent during the week commencing on October 22, 1972. His source of information concerning this absence was an itinerary for that week submitted to Mr. Osborn's secretary by plaintiff on Friday, October 20, 1972. Notice of plaintiff's absence in the succeeding weeks was given by itinerary's delivered by plaintiff's wife to Mr. Osborn's secretary each Friday. Plaintiff had previously given Mr. Osborn advance notice when taking military leave.

Some confusion in the record exists as to the written orders under which plaintiff went on military duty during the time in question. A copy of the orders indicated that he had been ordered to report to Chicago to attend the National Safety Council. Copies of the orders submitted to the Department of Labor and introduced as plaintiff's exhibit omitted the portion of the order which required his attendance at the Chicago conference. Plaintiff admitted altering the orders, but said he did so only because his military assign-

ments were secret and the Department of Labor was entitled only to that portion of the orders which established the dates with respect to which he was on military duty.

However, Lieutenant-Colonel W. T. Prescott, officer in charge of signing plaintiff's orders, advised the Department of Labor that contrary to plaintiff's testimony no question of secrecy attached to the military operations in which plaintiff was engaged.

On November 20, 1972, plaintiff was dismissed from his position with the Department of Labor. Appeal from his dismissal was rejected following hearings before Department of Civil Service Hearing Officer Orland Ellis on April 6, 1973. Hearing Officer Ellis also rejected plaintiff's appeal from the Department of Labor's refusal to pay for military leave during his absence from October 30, 1972 to November 3, 1972.

On August 9, 1973, plaintiff was cleared of charges that he violated Army policy in the manner in which he took his leave.

On August 16, 1973, plaintiff obtained reversal of a decision of the Michigan Employment Security Commission denying his unemployment compensation, due to the fact the Commission had not properly found misconduct on plaintiff's party by a preponderance of the evidence.

On October 2, 1973, following a meeting of September 18, 1973, the Civil Service Commission affirmed Hearing Officer Orland Ellis' original decision to affirm plaintiff's dismissal. On November 30, 1973, plaintiff petitioned the Ingham County Circuit Court for a review of the Civil Service Commission ruling. While this matter was pending, action by Ingham County Circuit Judge Donald L. Reisig in a separate matter involving unemployment compensation held invalid a department regulation under which plaintiff had been disciplined for speaking out publicly in opposition to departmental policy.

Shortly afterward, on October 18, 1974, plaintiff moved to have the instant case remanded to the Civil Service Commission for incorporation into the record of information from the hearing and opinion held before Judge Reisig on the invalid departmental regulation.

On March 11, 1975, an order was filed by Judge Kallman remanding the case to the Civil Service Commission to "take testimony along the lines set forth in the Motion," and to "determine its materiality," to decide "whether or not it was considered or not [sic] in the situation" and "then bring it up on the rest of the record."

Following a June 30, 1975 hearing before Hearing Officer Peter Jason, a grievance decision was released on December 30, 1975 which found that plaintiff's clean record prior to November 20, 1972 had not been considered either by the initial hearing officer or the Civil Service Commission due to the timing of the various decisions and that consequently plaintiff had not been evaluated as a first-time offender.

On September 8, 1976, Judge Kallman affirmed the Civil Service Commission in an opinion which sustained the original decision to dismiss plaintiff. Plaintiff appeals to us from that decision.

Defendant raises several allegations of error, we will discuss only one at length.

We must determine whether Judge Kallman, in affirming plaintiff's dismissal of November 20, 1972, committed error in failing to eliminate from consideration the possibility that the severity of that penalty may have been directly affected by notation of disciplinary action taken under a departmental regulation later declared invalid and expunged from plaintiff's record.

In addressing this question, the trial court stated:

> "It should be noted here that the Hearing Officer on remand from this Court found that the freedom of speech

issue heard by Judge Reisig was not material to the issue of dismissal. That finding is supported by the record. The freedom of speech issue dealt with a directive of the Department of Labor that Mr. Beaumont *cease and desist from holding press conferences and discussing policy matters with governmental representatives*. The decision by Judge Reisig which was favorable to the Plaintiff did not deal with discussion and criticism of superiors with department employees. There is nothing in the record to indicate that the freedom of speech issue played any part in the Plaintiff's dismissal." (Emphasis added).

On remand, Hearing Officer Peter Jason considered the impact of Judge Reisig's decision on the instant case and stated:

> "Considering first Judge Reisig's opinion: Mr. Brown who was then the Director of the State Department of Labor issued an order that the Grievant alleged impinged upon his rights of freedom of speech. Judge Reisig in his decision found that under the State Constitution the Civil Service Commission was the proper agency to establish rules and regulations governing state employees' behavior. Consequently, Mr. Brown had no authority to promulgate the rule, thus the discipline was improper. *The Judge did not decide, however, that the rule did or did not improperly impinge upon Grievant's* first amendment rights. Since there has been no attack by the Grievant anywhere in this matter that the rules that he has been found to have violated were promulgated in an improper fashion, I find that the opinion of Judge Reisig on the freedom of speech issue is not directly relevant or material to this matter." (Emphasis added).

A review of Judge Reisig's opinion convinces us that Jason was correct in his assessment of that opinion. Judge Reisig stated:

> "No matter how reasonable Mr. Brown's directive might have been, since it regulated condition of employment and tended to chill the employee's First Amendment rights of free speech, it was in contravention, as I've already indicated, of Article 11, Section 5, paragraph 4 of the State Constitution. Only the civil service commission had the power to pass such a rule or regulation. If such a rule or regulation had been passed by the civil service commission, then Brown would have had the power to enforce that regulation and the issue would then be squarely before this court as to whether or not that regulation is a valid impingement upon the employee's rights or is a valid protection of the governmental interests."

The paragraph of the State Constitution to which Judge Reisig refers provides:

> "The [Civil Service] Commission shall classify all positions in the classified service according to their respective duties and responsibilities* * * *make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.*" Const 1963, art 11, §5. (Emphasis added).

The decision to dismiss in this case did not directly consider the free speech question raised by plaintiff in the matter Judge Reisig decided. On the contrary, dismissal of plaintiff from his job in the instant case was grounded on charges that:

> "The person named above took off for a month of military duty without approval of his supervisor and without any conversation with his supervisor.
>
> "He made no plans for the continuation of the training of a new employee while he is gone.
>
> "He made no plans for the supervision of his field personnel while he is gone."

Plaintiff was also charged with being critical of his supervisor and communicating this criticism to his personnel to

the detriment of the morale and effectiveness of the Board of Safety Regulations.

On this matter, Hearing Officer Ellis stated:

> "The Hearing Officer finds that as a matter of fact that Mr. Beaumont discussed with subordinate field employees departmental problems and also that he criticized his supervisor to these field employees. This conduct is contrary, not only to departmental policy, but to good standards of conduct in public or private employment." (Emphasis added.)

Plaintiff was given a full and proper hearing on each of these charges. His claim on appeal that the disciplinary action regarding the invalid regulation affected his dismissal has been held unfounded as a matter of fact by Hearing Officer Jason on rehearing and affirmed as legally correct by Judge Kallman on appeal. We accept Hearing Officer Jasons finding of fact on appeal and further perceive no legal error in these proceedings or Judge Kallman's review of these proceedings. Thus, concerning the improper consideration of the invalid regulation in the present dismissal, we affirm the holdings below.

Having reviewed plaintiff's other allegations of error, we find non substantial enough to merit lengthy comment or to reverse on.

Affirmed.

EXHIBIT "C"

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 17th day of January in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 23-429

ROBERT A. BEAUMONT,
Plaintiff-Appellant,

-vs-

61657 COA: 30558
LC:73-16070-AV

MICHIGAN DEPARTMENT OF LABOR and MICHIGAN CIVIL SERVICE COMMISSION,
Defendants-Appellees.

On order of the Court, the appplication for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true

and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of January in the year of our Lord one thousand nine hundred and seventy-nine.

(s) Corbin R. Davis, *Deputy Clerk*

EXHIBIT "D"

STATEMENT OF SUPPORT FOR THE GUARD AND RESERVE

We recognize the National Guard and Reserve as essential to the strength of our nation and the maintenance of world peace. They require and deserve the interest and support of the American business community, as well as every segment of our society.

In the highest American tradition, these Guard and Reserve forces are manned by civilians. Their voluntary service takes them from their homes, their families and their occupations. On weekends, and at other times, they train to prepare themselves to answer their country's call to active service in the United States armed forces.

If these volunteer forces are to continue to serve our nation, a broader public understanding is required of the total force concept of national security—and the essential role of the Guard and Reserve within it.

The Guard and Reserve need the patriotic cooperation of American employers in facilitating the participation of their eligible employees in Guard and Reserve programs, without impediment or penalty.

We therefore join members of the American business community in agreement that:

1. Our employees' job and career opportunities will not be limited or reduced because of their service in the Guard or Reserve;

2. Our employees will be granted leaves of absence for military training in the Guard or Reserve without sacrifice of vacation time; and

3. This agreement and the resultant policies will be made known throughout the organization and announced in publications and through other existing means of communication.

Secretary of Defense

Chairman
National Committee for Employer Support
of the Guard and Reserve

Governor
State of Michigan

EXHIBIT "E"

1900 Willowbrook Drive
Lansing, Michigan 48917
January 15, 1973

Hon. William G. Milliken, Governor
STATE OF MICHIGAN
State Capital
Lansing, Michigan 48902

Dear Governor Milliken:

I am a reserve officer of the United States Army Reserve and an 8+ year employee of the Michigan Department of Labor who, upon my release from active duty on November 20, 1972, was summarily discharged!

And under the protections provided by State law (see copy of Act #205, 1897 as amended by Act #179, PA 1959—attachment pages #25 & #26 . . .) I herewith respectfully request (1) immediate reinstatement to my job, with full back pay and allowances, and (2) the FULL HEARING BEFORE THE GOVERNOR that this law provides.

Also we are advised by the Federal government (see attached letter of January 3, 1973 . . .) that this summary dismissal also violates Acts #263, PA 1951, #133, PA 1955 of the State of Michigan and the Federal acts—all of these laws enacted by the people to protect the veteran/reservist who serves his (our!) country. (Copies of these Acts are attached—pp 17-24 . . .)

Please know that this illegal action has caused great suffering and sorrow to my family and myself—including the irrevocable loss (death) of a dear one.

We look forward to the reliefs available thru your good offices, Governor . . .

Respectfully,

(s) Robert A. Beaumont, C.S.P.
Supervisor, Safety Services
Department of Labor

Lieutenant Colonel, Ordnance Corps
United States Army Reserve

Attachments:
Dismissal File—including Veterans preference/ reemployment Acts
January 3, 1973 letter of the United States Department of Labor

EXHIBIT "F"

(Department of Labor Letterhead)

January 26, 1973

Mr. Robert A. Beaumont
1900 Willowbrook Drive
Lansing, MI 48917

Dear Mr. Beaumont:

Your letter of January 15, 1973, to Governor William G. Milliken has been referred to me for response.

Classified Civil Service employees in the state service are not subject to the legislation to which you refer in your letter.

The Constitution of the State of Michigan takes precedence over such legislation and is controlling on all matters of employment affecting classified state employees.

Article XI, section 5 of the Constitution of the State of Michigan charges the Michigan Civil Service Commission with exclusive responsibility and authority to regulate all conditions of employment affecting classified Civil Service Employees.

The interpretation of these constitutional provisions has been affirmed in a number of Attorney General Opinions, the most recent of which being Opinion No. 4709, dated September 4, 1970, signed by Attorney General Frank J. Kelly.

The matter of your dismissal has been scheduled for a full hearing before a Civil Service Hearing Officer on January 31, 1973. This Civil Service hearing is the proper legal process through which classified state employees present grievances and seek such relief as you request in your letter to Governor Milliken.

Very truly yours,

Barry Brown

cc: Governor William G. Milliken
Sidney Singer, State Personnel Director
Members of the Civil Service Commission